HAJI AHMAT v. ONG BAK HIN

[O.C.J. (Hepworth J.) July 13, 1959]

[Malacca — Civil Suit No. 32 of 1957]

Practice and Procedure — Pleading — Departure — Claims in Reply not inconsistent with previous pleadings — Objection — Waiver — R.S.C. 1957, O.19 rr.16 and 27.

Limitation — Possession of land — Limitation Ordinance, 1953, ss.6(1) and 9(1).

Order 19 r.16 of the Rules of the Supreme Court aims at preventing a departure in pleading. A departure takes place when in any pleading the party deserts the ground that he took up in his preceding pleading, and resorts to another and a different ground. Where the claims set up in the Reply are not inconsistent with the previous pleadings their inclusion in the Reply does not constitute a departure: however it is not a desirable practice to have the claims dotted about the pleadings. The Statement of Claim should be what it purports to be, that is to say a statement of the plaintiff's claim and not a statement of half his claim.

On a plea of limitation the fact that the owner of a piece of land has abandoned possession is not by itself enough. Active, hostile possession is necessary: this possession must be uninterrupted possession.

Cases referred to:—

(1) *Renton Gibbs* v. *Neville* [1900] 2 Q.B. 181.

(2) *Re Orr-Ewing* (1883) 22 Ch.D. 456.

(3) *Willis* v. *Earl Howe* [1893] 2 Ch. 545.

CIVIL SUIT.

R. H. V. Rintoul for the plaintiff.

H. P. Ball for the respondent.

Hepworth J.: The plaintiff who resides at No. 461 Tranquerah Road Malacca, is suing as Administrator of the Estate of his father Haji Mohamed bin Haji Hassan sometimes known as Mat Lembing (hereinafter referred to as the "deceased"). The defendant is a property owner residing at No. C.2433 Klebang Kechil, Malacca.

The deceased had been the owner of the lands, the subject matter of this action, for many years prior to 1937 in which year he went to Mecca. On his return from Mecca in 1939 he was the subject of an acid attack as a result of which he became blind. The defendant, who was at the time a doctor in practice in Malacca, treated the deceased on this occasion. The defendant had been acquainted with the deceased for many years prior to 1939 but this was the first time he had acted as the deceased's doctor.

In October, 1949, the deceased died and the plaintiff, his son, took out Letters of Administration to his Estate. The lands the subject matter of this action were not included in the Petition for Letters of Administration.

The plaintiff alleged that the first time he came to know about these lands not being included in the Petition was in 1957. He searched the register and found they were still registered in the name of the deceased. He then took the steps necessary to get his name registered as proprietor as Administrator of the Estate of the deceased.

The defendant, in whose possession the title deeds of four of the pieces of land are, alleged that the deceased sold him the five pieces of land specified in the pleadings for $1,500 in 1937 before the deceased went to Mecca, that he has been in possession of the land ever since, and that these lands were not included in the Petition for Letters of Administration because the plaintiff well knew this to be the case.

The plaintiff as Administrator is claiming (1) the return and delivery to him of Malacca Statutory Grants numbered 22770 22771, 22772, 22773 and 20389 relating respectively to Lots 649, 645, 641, 356 and 650 situated in the District of Tanjong Kling in the State of Malacca, (2) damages for the wrongful detention of the same, (3) damages for the wrongful act of the defendant in the erection and continued maintenance of a fence circumscribing the said lands, (4) that the sale alleged by the defendant be set aside and cancelled and/or declared void, (5) for a declaration that the legal title to the said lands is vested in him as Administrator of the Estate of the deceased, (6) that the defendant is a trespasser on the said lands and he do remove the said fence and vacate the said lands, (7) costs, and (8) such further or other relief as may be deemed just by the Court.

The defence was that the defendant was not acting wrongfully but was entitled to maintain the fence and to detain the said title deeds because he was the owner in possession of the said lands. Alternatively the plaintiff's cause of action did not accrue within six years before the commencement of this action and the defendant relied on section 6(1) of the Limitation Ordinance, 1953. In the further alternative the defendant had been and still was in possession of the said lands for upwards of 12 years and as any claim by the plaintiff was barred by section 9(1) of the Limitation Ordinance, 1953, and as the plaintiff's right and title (if any) to the said lands were extinguished by virtue of section 18 of the said Ordinance *a fortiori* the plaintiff's right and title (if any) to the Deeds claimed was also extinguished. The defendant then prayed that this action be dismissed with costs.

The plaintiff's claims numbered (1), (2) and (7) above were endorsed on the Writ. The plaintiff's claims numbered (1), (2), (3), (7) and (8) above were made in the Statement of Claim. In the Reply the plaintiff repeated the prayers contained in the Statement of Claim and further prayed for claims numbered (4), (5), (6) and (8) above. In his Reply therefore the plaintiff has purported to enlarge his claim by praying in addition for the claims numbered (4), (5) and (6) above. The defendant maintained that the additional prayers in the Reply did not have the effect of enlarging his Writ. That could only be done in the Statement of Claim. He quoted in support of his argument *Renton Gibbs* v. *Neville* (1). The defendant submitted that as enlargement of the Writ in the Reply was not known to the Rules, the fact that the defendant

did not take the opportunity to strike these prayers out of the Reply and took a step in the action thereafter, does not amount to waiver.

The plaintiff argued that there was specific provision for expansion of a generally endorsed Writ in O.20 r.4. He further argued that the Writ was expanded in the Reply because until the Statement of Defence was filed the plaintiff had no idea what would be pleaded, that the operative word in O.19 r.16 is the word "inconsistent," and that the prayers in the Reply were in no way inconsistent with the previous pleadings. He added that what was done was permitted by O.19 r.15.

But even if the Rules of Pleading had been contravened, the plaintiff argued, the defendant has waived his right to object. He should have taken an objection under O.19 r.27 but has not done so. O.70 r.2 is applicable (*Re Orr-Ewing* [2]; Annual Practice, 1957, p. 1601). Taking objection at the trial defeats the objects of O.70 r.3 which provides that express notice of such objection must be given.

O.70 r.1 provides that non-compliance with any of the Rules of the Supreme Court, 1957, or with any Rule of practice for the time being in force, shall not render any proceedings void unless the Court or a Judge shall so direct. In the first place the defendant should have taken the objection when the Reply was filed. Had he done so the plaintiff would probably have agreed to the deletion of these claims from the Reply and applied to amend his Statement of Claim. By taking a subsequent step in the action as it is admitted the defendant has done he has, I think, waived his right to object. But O.19 r.16 aims at preventing a departure in pleading. A departure takes place when in any pleading the party deserts the ground that he took up in his preceding pleading, and resorts to another and a different ground (*Odgers on Pleading and Practice*, 15th Edn., p. 232). It seems to me that the claims set up in the Reply were not inconsistent with the previous pleadings and therefore their inclusion in the Reply does not constitute a departure in pleading in the particular circumstances of this case. I do not, however, think that it is a desirable practice to have your claims dotted about the pleadings. I think your Statement of Claim should be what it purports to be, that is to say a statement of your claim and not a statement of half your claim.

There are two matters raised in the pleading which I think can be disposed of at the start and they are the pleas of estoppel and fraud. Estoppel has been pleaded both by the plaintiff and by the defendant, but it appears to me that no question of estoppel arises in either case because neither the plaintiff nor the defendant has been induced by the acts alleged to constitute the estoppel to act in a manner to his own detriment. The plaintiff has made allegations against the defendant that the defendant acted fraudulently and also exercised undue influence over the deceased. There is no evidence whatever from the start to the finish either that the defendant exercised undue influence over the deceased or that he acted in any way fraudulently.

On the plea of limitation the fact that the owner of a piece of land has abandoned possession is not by itself enough (*Willis* v. *Earl Howe*, [3] at p. 554). Active, hostile possession is necessary (*Rustomji's Law of Limitation*, 5th Edn., Vol. II, 1367). This possession must be uninterrupted possession (*Rustomji's Law of Limitation*, 5th Edn., Vol. II, 1233). The sale was alleged to have taken place in 1937 and DW2, who was employed by the defendant from 1936 to 1939 part-time and from 1940 onwards full-time as his agent to look after the defendant's properties, said that he took charge of these pieces of land in the latter part of November, 1937. The question as to whether the defendant's occupation of the land was active, hostile possession can, I think, be answered conclusively in the negative by DW2's own evidence as to what happened in 1955. He stated that in 1955 he bought a plan from the Land Office for the purpose of locating the boundaries of the pieces of land which were then under jungle. It seems to me that this conclusively proves that, although he may well have been keeping an eye on the land since 1937, there was not in fact the necessary active, hostile possession on the part of the defendant until 1955. That being the case it seems to me that the defendant's pleas of limitation whether under section 6(1) or under section 9(1) of the Limitation Ordinance, 1953, fail.

We therefore come to the question as to whether or not the defendant is the owner in possession of the said lands.

At the hearing the fact that the five Grants referred to were registered in the name of the deceased until 1957 when the plaintiff got himself registered as proprietor as Administrator of the Estate of the deceased was not disputed. But the defendant stated in evidence that he was in possession of four out of the five Grants and had, prior to the Japanese occupation, been in possession of the fifth Grant and also an unregistered conveyance, both of which had been lost during the Japanese occupation, as a result of the purchase by him of these Lots from the deceased in 1937 for $1,500. This being the case the defendant said that he was the legal owner of the lands and was entitled to retain the Grants.

The plaintiff's story was that on the death of his father in October, 1949, he sealed the iron safe in which, as far as he was aware, the title deeds of his father's lands were kept, and that he then asked a Mr. Bell, a Solicitor, to apply for the grant of Letters of Administration to his father's Estate, and in order to do this Mr. Bell came and took away the contents of the safe. The plaintiff in examination in chief said that he did not know whether the Grants, the subject of this suit, were in the safe, but he was

satisfied that all the title deeds in the safe were included in the Petition for Letters of Administration. The titles in issue in this case were not included in the Petition for Letters of Administration to the Estate of the deceased. It was the plaintiff's case that he only came to know about these 5 title deeds in 1957 when one Noordin told him about them and then on investigation he found that the lands were still registered in the deceased's name. He then took the steps necessary to have his name registered as the proprietor as Administrator of the Estate of the deceased.

I was not favourably impressed by either the story told by the plaintiff or by the story told by the defendant.

The plaintiff admitted that he could identify the pieces of land on the ground quite easily and that in the life time of his father he knew the pieces of land belonged to his father. In other words these pieces of land were well known to him. As I have already observed, in examination in chief the plaintiff stated he did not know whether the Grants, the subject of this suit, were in the safe. In cross-examination he said that when the Solicitor opened the safe to take out the contents he, the plaintiff, discovered that the title deeds of these 5 pieces of land were not there. He added that he thought the deceased must have kept them somewhere else. At the conclusion of his evidence I asked the plaintiff whether he told his Solicitor about the title deeds when he discovered that they were not in the safe. He replied that he did not know whether the Grants were there or not. When I drew his attention to the fact that he had just said that they were not there, he then said that he did not tell the Solicitor. When I then asked him why he did not tell the Solicitor, he replied that he did not tell him because he did not know the whereabouts of the title deeds.

It became apparent on this evidence therefore that the plaintiff was a man upon whose evidence no reliance could be placed, and on weighing the evidence carefully I have come to the conclusion on the balance of probabilities that the plaintiff knew that these title deeds were not in the safe, that he knew that the titles were not included in the Petition for Letters of Administration, and that the reason he had done nothing about it until 1957 was because he knew that there had been a purported sale of these pieces of land to the defendant in 1937. He only became active in the matter when he learnt in 1957 that these lands were still registered in the name of the deceased.

I find therefore that there was a transaction which purported to be a sale, but I am not prepared to accept the defendant's account of that transaction and of what took place. The defendant's reason, so he said, for not registering the conveyance, which he said was prepared by a Solicitor and executed by the deceased in the Solicitor's office, was because there was a mistake in it. He said that the mistake was that one of the pieces of land had been omitted and that the conveyance should have been in respect of five pieces of land but only four were in fact included. When he was asked why he did not have the conveyance rectified before the deceased went to Mecca in view of the fact that he had noticed the mistake the day after the conveyance was executed, he replied that the deceased was away the next day, from which I understood him to mean that the deceased went to Mecca the next day. However it appeared to be clear from one of the defendant's own witnesses (DW3) that the deceased did not leave for Mecca until some 5 or 6 months after the purported sale had taken place.

The defendant also gave no satisfactory explanation of how the conveyance came to be lost. Nor did he give any satisfactory explanation as to why he took no steps to get the conveyance rectified and himself registered as proprietor between the deceased's return from Mecca in 1939 and the Japanese occupation.

On carefully considering the defendant's evidence together with that of DW3, I am satisfied that the transaction that took place between the deceased and the defendant purported to be a sale, but I think on the balance of probabilities that what occurred was that the defendant handed a cheque for $1,500 to the deceased and that the deceased in return, either then or at a later stage, handed the documents of title to the defendant. In other words what took place was a verbal agreement for the sale of these properties by the deceased to the defendant for $1,500.

There is no evidence of any memorandum in writing evidencing this agreement, and as a result this verbal agreement is in my opinion unenforceable.

I therefore order that the purchase be set aside and such title deeds as are in the possession of the defendant be returned to the plaintiff on the plaintiff repaying to the defendant the purchase money of $1,500. I further order that both parties pay their own costs. There will be no order in respect of the remaining prayers contained in the Statement of Claim and the Reply.

Order accordingly.

Solicitors: *Shearn Delamore & Co.*; *Allen & Gledhill.*

NIAZ BI BI v. MOGAH OMNIBUS CO. LTD.

[O.C.J. (Good J.) September 18, 1959]

[Ipoh — Civil Suit No. 160 of 1958]

Practice and Procedure — Trial — Judge trying issues of fact — Application for rule on question of law distinguished from that of fact — Discretion.

Companies — Company practice — Distribution of net profit — Practice ultra vires powers of directors — Companies Ordinance, 1940, s.12.

Where a Judge is sitting alone and trying issues of fact, it is highly inconvenient that he should be asked